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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 509

UNITED STATES OF AMERICA, PETITIONER

v.

HARRY N. BAETJER ET AL., TRUSTEES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit, entered in the above cause on June 26, 1944, reversing the judgment of the United States District Court for Puerto Rico.

OPINIONS BELOW

Acting Judge Snyder's findings of fact, conclusions of law and judgment are printed at R. 23–26. Judge Cooper's memorandum opinion denying respondents' motion for a new trial (R. 36–37) is not reported. The opinion of the circuit court of appeals (R. 559–567) is reported in 143 F. (2d) 391.

QUESTION PRESENTED

Whether the United States is liable, in condemnation proceedings, for severance damages to sugar mill properties because of resulting economic overcapacity, where the lands actually taken are not physically contiguous to the mill properties and are not presently devoted to the same use, and the properties are not held entirely in a unified fee ownership.

STATEMENT

The United States on June 26, 1942, instituted condemnation proceedings to acquire for war purposes the fee title to two noncontiguous parcels of land (Parcels A and B) aggregating 7,936.6 acres owned by Eastern Sugar Associates on the island of Vieques (R. 1–4). Parcel B, consisting of approximately 1,700 acres, constituted the eastern 3½-mile tip of the island of Vieques and included all lands owned by respondents in that part of the island (R. 91; Defendants' Exhibit B, R. 465). Parcel A, containing approximately 6,300 acres, lies 5 or 6 miles to the west of Parcel B (R. 141) and is located in the central part of the island. It embraces all the remaining holdings of Eastern Sugar Associates on the island of Vieques except 2,500 acres situated to the west of Parcel A. Some of the remaining lands are contiguous to Parcel A, while others are isolated tracts. (See Defendants' Exhibit B, R. 465.) Simultaneously with

the institution of the condemnation proceedings, the Government filed a declaration of taking, depositing $235,460 in court as estimated compensation for the 7,936.6 acres thus taken (R. 3, 7–10).

The respondents answered, alleging that the land condemned was a part of a single integrated property known as Eastern Sugar Associates, consisting of approximately 10,500 acres of land on the Island of Vieques and 20,000 acres of land on the island of Puerto Rico; that on the entire property are located four sugar mills, an extensive railway system, docks, warehouses, etc.; and that it is devoted as an integrated whole to the raising of sugar, pasture for the raising and feeding of livestock, and the transportation and processing of sugarcane into raw sugar (R. 11–12).[1] The answer contained further allegations that the taking of the lands in question deprived respondents "of a part of Eastern Sugar Estates essential for its economical operation" (R. 12); that "due to improved methods of agriculture in recent years, the part of Eastern Sugar Estates located in Vieques has become more attractive and available as a source of cane supply" (R. 13); that as a result

[1] Vieques lies about ten miles to the east of the southeasterly corner of the island of Puerto Rico. Respondents' dock on Vieques is 17 nautical miles distant from their docking facilities on Puerto Rico and still further from their four sugar mills, all of which are located on the mainland of Puerto Rico (R. 80, 103).

of the taking "defendants have been required to break up and dispose of their herd of livestock on a forced sale basis" (R. 13); and that "the deprivation of the lands taken hereunder results in a depreciation to the said Eastern Sugar Estates, and the part thereof remaining in Vieques, in the use and value thereof, of upwards of $1,250,000" (R. 13).

The case came on for trial in November of 1942 before Acting Judge Snyder, sitting without a jury (R. 68, 168). The court heard oral testimony, received documentary evidence, saw motion pictures of (R. 156–158, 196–198) and personally viewed the property (R. 32, 157, 195–196). The evidence and the court's rulings may be briefly summarized as follows:

After listening to argument on the question whether Eastern Sugar Associates were legally entitled to severance damages for properties not contiguous to those taken, the court ruled that he would hear evidence of the nature of such damages to other properties in Vieques and on the mainland proper, subject to a later motion to strike (R. 74, 82, 83–84, 87, 92, 93, 99, 170–172, 188).

Witnesses for the respondents admitted that the growing of sugarcane on the land taken had been abandoned in 1938 (R. 76, 82–83, 89, 122, 197), and that the demand for cattle in connection with the sugar industry was waning because trucks and

tractors were replacing oxen in the cultivation and transportation of sugarcane (R. 89, 111–112, 113, 154, 175; cf. R. 331, 379). Respondents' witnesses nevertheless maintained that the Eastern Sugar Associates had suffered severance damages by reason of the Government's taking of these nonproducing cane lands on the island of Vieques. They testified that the damages (including severance) amounted to $760,650 (R. 86–94, 98); $614,498.40 (exclusive of severance, R. 117); $815,585 (R. 132); $825,507 (R. 134–135, 145, 148, 151); $1,007,000 (R. 184–186, 189, 199–201); and $964,400 (R. 225–226).[2]

In testifying as to the integrated character of the Eastern Sugar Associates' holdings, their Vice President and General Manager stated that respondents "are in the sugar business in Puerto Rico" and "their primary object is to run mills to convert the cane * * * into sugar" so that the "mills—the whole enterprise—does not lose money" (R. 185); that the taking of lands in Vieques "affected the value of the balance of the Eastern Sugar Estates—that is, the property in Puerto Rico" to the extent of $270,000 (R. 184–186).

After considering, during a week-end recess, the legal authorities submitted by the parties and

[2] This latter figure was based on special value of the property to the Eastern Sugar Associates. This witness admitted that based on the usual willing buyer and willing seller rule, the damages would amount to only $482,800 (R. 228).

the evidence which Eastern Sugar Associates had introduced as their case in chief, and in order to apprise the Government of the issues which it would have to meet, the court ruled "that the lands of the defendant located in Puerto Rico proper have not been severed in the legal sense from the lands taken by the United States in this case" (R. 242), and accordingly struck "all the evidence adduced by the defendant purporting to show that the lands of the defendant located in Puerto Rico have been damaged by virtue of the taking in this case" (R. 242). The court also ruled that the taking of the grazing and waste land on the eastern tip of the island of Vieques (Parcel B) did not affect respondents' other lands six miles to the west (R. 242). Pending consideration of additional evidence to be adduced by the parties, the court reserved its ruling on the question of respondents' claim of severance damages for the other 2,500 acres (contiguous and noncontiguous) to Parcel A (R. 242).

Witnesses for the Government denied that the property was suitable for the growing of sugar cane, pointing to the fact that the rainfall on Vieques was much lower than on Puerto Rico (R. 246–257, 297–300, 308); that the growing of sugar cane on the lands in question had been abandoned in 1938 and that every company growing cane on Vieques had been forced into reorganization proceedings at sometime or other during the past 20 years (R. 239, 301–302, 308).

These witnesses stated that the respondents had suffered no severance damages and valued the portions taken at $235,459 (R. 269); $205,000 (R. 297, 302); $271,370 (R. 323–324); $264,650.08 (R. 341) and $328,156.86 (R. 377–378).

At the conclusion of the testimony the trial judge asked that he be supplied with a transcript of the testimony as soon as it was available and requested that the parties prepare factual summaries of the evidence in support of their respective theories (R. 452). This was done. Thereafter, the trial judge filed findings of fact, conclusions of law, and judgment (R. 23–26). He concluded that "the damages the defendant, owner of said property, suffered amount to $361,500.00" and entered judgment accordingly (R. 25–26).

The respondents moved for a new trial (R. 27–30). In a brief memorandum denying this motion, Judge Cooper stated that "after careful study of the voluminous record of the trial proceedings, the oral testimony and other testimony," he was of the opinion that the judgment "is amply supported by the law and the facts, and it does not appear that any error was committed which would entitle defendant to a new trial" (R. 37).

The respondents appealed to the First Circuit. That court apparently construed Judge Snyder's ruling excluding respondents' claim for severance from property on the mainland of Puerto

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Rico as being based solely on lack of physical contiguity, and concluded that the denial of severance damages because of physical separation of the property, although by a distance of 17 miles, was erroneous as a matter of law (R. 562–566).

REASONS FOR GRANTING THE WRIT

The sugar mills of the Eastern Sugar Associates are located on the mainland of Puerto Rico, which is some 17 miles away from the land taken. (See p. 3, note 1, *supra*.) This large enterprise has scattered holdings on Vieques and on the mainland of Puerto Rico. The court below decided (R. 565) that these widely separated parcels might be deemed a single tract for severance purposes, and that, if so, there would be a compensable loss if "after the taking the appellants' mills had an uneconomic overcapacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking". (R. 565.)

1. In so holding, the court below has gone beyond anything heretofore decided by the federal courts and the overwhelming majority of the state courts in relation to severance damages. The allowance of such damages is an exception to the general rule that the Government need pay only for property actually taken. As explained in *United States* v. *Miller*, 317 U. S. 369, 375–376, "If only a portion of a single tract is taken, the

owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract." But "as respects other property of the owner consisting of separate tracts adjoining that affected by the taking, the Constitution has never been construed as requiring payment of consequential damages * * *." The courts have been very strict in construing what constitutes a single tract for severance purposes. Heretofore the courts have never allowed severance damages for physically separated tracts except where the parcels were separated by a street, creek, railroad right-of-way, or other similar easement. See 2 Nichols, *Eminent Domain* (2d ed., 1917), 740. The reasons are evident. The allowance of damages to disconnected tracts would add to the uncertainties of the award; would discriminate against owners of similar property who did not own any of the land taken, and would in substance constitute an award of damages for loss of business or prospective business. That the latter factor is to be excluded in an award of compensation is made clear by *Mitchell* v. *United States*, 267 U. S. 341, where the claimants were seeking to recover damages of a kind closely similar to those here in question. There the Government took land used by the plaintiffs in the business of growing and canning corn of a special grade and quality; as a result of the taking the plaintiff's canning business was destroyed, there

being no other lands in the vicinity suitable for growing corn. Compensation for such damage was held properly disallowed. In the present case respondents are in effect seeking damages caused by the taking of some lands which might be used to supply cane for their mills.

The only cases relied on by the court below with respect to the effect of lack of contiguity (*United States, ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 276, and *McCandless* v. *United States*, 298 U. S. 342, 345) presented a wholly different issue. In those cases it was pointed out that the value of the land actually taken, measured by its highest and best use, might be affected by its present or potential relationship to other land in the vicinity. In the present case the question at issue is not such measurement of the value of the land taken, but is the allowance of additional damages to the remote lands not taken.

Similar claims have been made and rejected in numerous state cases. Thus, in *City of Oakland* v. *Pacific Coast Lumber Company*, 171 Cal. 392, arising under a statute embodying the concept of severance damages as defined in the *Miller* case, *supra*, the court affirmed the trial court's disallowance of severance damages where there had been a taking of land used as dock facilities and lumber yard for an established mill business located about 400 feet from the land taken. In *Potts* v. *Railroad Co.*, 119 Pa. 278, the court af-

firmed the disallowance of recovery for damages to the defendant's marble quarry and sales yard, where non-contiguous land used by it for storing and shipping had been taken. In *State* v. *Bradshaw Land and Livestock Company,* 99 Mont. 95, the court reversed an allowance of recovery for damages to grazing lands of the defendant which were separated by a maximum of 9 miles from other grazing lands owned by it and used in its business, which were taken. See also *Matter of New York Central & H. R. Railroad Co.,* 6 Hun. 149; *Railroad* v. *Aubuchon,* 199 Mo. 352; *Fleming* v. *Chicago, D. & M. Railroad Co.,* 34 Iowa 353; cf. *Paulson* v. *State Highway Commission,* 210 Iowa 651; *Kansas City, M. & O. Railway Company* v. *Littler,* 70 Kan. 556.

2. The court below regarded the ruling of the district court as one based solely on the lack of physical contiguity between the defendants' lands. So construed, we believe, as has been indicated, that the decision of the district court should have been affirmed. But we think that the circuit court of appeals misconceived the basis of the trial court's ruling. The trial court refused to rule on the matter until after he heard all of the respondents' evidence so that he would know the precise nature of their severance claim (R. 74, 82, 83–84, 87, 92, 93, 99, 170–172, 188). That this ruling was not based solely on physical separation is further apparent from the fact that he still

reserved his ruling on the question of respondents' claim of severance damages for several small non-contiguous tracts *on Vieques,* in close proximity to parcel A (R. 242; see Defendants' Exhibit B, R. 465).

If the trial court was required, as the circuit court of appeals held, to consider unity of use even though there was no physical unity, it is submitted that the evidence offered by respondents and contained in the record was plainly inadequate to make out a case for severance damages, and that a remand for the purposes of rebuttal evidence and evidence of damage to the non-contiguous mill properties was erroneous and imposes an unwarranted burden in the trial of this type of case. The evidence shows that the land which was condemned was not at that time being used for the growing of sugar cane (R. 76, 82–83, 89, 122, 197). It was being held as a future source of supply, when better lands were no longer available on the mainland or elsewhere on Vieques (cf. R. 105). Since the use of these lands for growing cane was only prospective, severance damages for such a purpose are not allowable under the adjudicated cases. The decisions are unanimous in holding that severance damages to a non-contiguous tract may not be considered in arriving at an award where unity of use for the land taken and the land remaining is only prospective. *White* v. *West Side Elevated R. R.*

Co., 154 Ill. 620, 39 N. E. 270 (1894); *Railroad* v. *Aubuchon*, 199 Mo. 352, 97 S. W. 867 (1906); *Fleming* v. *Chicago, D. & M. Railroad Co.*, 34 Iowa 353 (1872).

The cases also make it clear that severance damages are not allowable for lands used by the condemnee in connection with those taken unless there is absolute unity of title. That is, the requisite unity of ownership for several properties does not exist if the same or different persons own different interests in different parcels. For example, in *Atlantic Coast Line R. Co.* v. *United States*, 132 F. (2d) 959 (C. C. A. 5, 1943), the railroad had placed in the hands of a wholly-owned subsidiary the title to certain lands which were being held for future expansion (p. 961). The real estate agent of the railroad contended that a taking of a portion of this land by the United States had affected the value of Atlantic Coast Line's transportation system. In holding such evidence inadmissible, the circuit court of appeals said (p. 963): "His idea of severance damage was properly rejected, for this land is not a part of the Atlantic Coast Line transportation system and has never been used by it. * * *. Severed in use and ownership from the transportation system, it cannot so affect the system as to involve legal injury to the system by its taking." Similarly, in *Glendenning* v. *Stahley*, 173 Ind. 674, 91 N. E. 234

(1910), one spouse owned the condemned tract in fee and claimed damages for a contiguous tract which was used as part of the same farm, the title of which was held by both spouses as tenants by the entirety. There being no absolute unity of title, severance damage was disallowed. See also *Tillman* v. *Lewisburg & N. R. Co.,* 133 Tenn. 554, 182 S. W. 597 (1916) (converse); *Duggan* v. *State,* 214 Iowa 230, 242 N. W. 98 (1932) ownership of one section in X, of other in X and her brother); *Potts* v. *Railroad Co.,* 119 Pa. 278, 13 Atl. 291 (1888) (one tract belonging to A, the other to A and B, partners, as tenants in common); cf. *East Bay Municipal Utility Dist.* v. *Kieffer,* 99 Cal. App. 240, 278 Pac. 476 (1929), rehearing denied, 99 Cal. App. 260, 279 Pac. 178 (1929) (condemnee owned some lands and had options for other connecting parcels). The record in the instant case shows that the respondents owned 22,000 acres and rented an additional 17,200 acres (R. 175), all the rented lands being in Puerto Rico proper (R. 190, 210). In their claim for severance they treated all these lands as part of their integrated business and claimed severance accordingly. The general manager of the company himself admitted that he was unable to allocate his alleged claim of severence among the various properties they held on the mainland and elsewhere (R. 186).

3. The question whether the Federal Government's liability in condemnation cases should be extended to include severance claims of the type here involved is an important one which should be further clarified by this Court. If the ruling below is sound, large integrated companies with disconnected holdings will in fact be obtaining, under the guise of severance damages, compensation for business losses which were denied by this Court in the *Mitchell* case, *supra*.

Such a rule would also present difficult appraisal problems. "The measure of compensation when part of a tract is taken is the difference between the fair market value of the whole before the taking and the fair market value of what remains." 2 Nichols, *Eminent Domain* (2d ed. 1917), p. 723. If separate holdings by the same owner may be considered one tract regardless of physical separation, it will be necessary for the Government, whenever it condemns a small tract belonging to a large integrated company, to undertake the valuation of that company's entire holdings. Appraisal problems will thus be made infinitely more complex, and the Government will be unable to predict in advance, with any degree of certainty, what the ultimate award will be for a particular taking for military and other purposes.

Resting as it does on a concept of just compensation in the constitutional sense, the effect

of the decision below could not be avoided by federal legislation limiting compensation to the value of the land taken in circumstances like those here disclosed.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1944.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

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UNITED STATES OF AMERICA, *Petitioner,*

v.

HARRY N. BAETJER, *et al.*, Trustees,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

EARLE T. FIDDLER,
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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

The opinion of the Circuit Court of Appeals (R. 559-567) is correctly cited in the Petition.

Statement of the Case

No questions of fact are raised in the Petition. No questions of fact were passed upon or decided by the Circuit Court. The District Court in reality made no findings

of fact (R. 23, 24). The statement of facts in the Petition is the Petitioner's own interpretation of the facts which the Record shows were the subject of much conflicting testimony. How much of the testimony and what testimony the District Court believed is a matter of pure conjecture. If issues of fact were involved in these proceedings we would necessarily be forced to take issue with many of the statements and conclusions of fact as represented by the Petitioner.

The only fact of importance is the fact that the lands condemned were physically separated from the balance of what Respondents claim is an entire integrated property, of which Respondents have consistently maintained that the part condemned formed an integral part. The only point decided was that the District Court erred in refusing as a matter of law (R. 242) to permit Respondents to prove that the property was an integrated whole, and the damage, if any, resulting from the severance.

We assume that this Court will not study the record to determine whether or not the Petitioner has correctly stated facts which are not in issue in this proceeding, and, therefore, refrained from pointing out errors in the statement of facts.

Summary of Argument

I. The "Question Presented" was not in issue in the Circuit Court and was not decided by the Circuit Court.

II. The petition does not state any reasons sufficient to justify granting the writ.

a. Petitioner has not correctly interpreted the opinion of the Circuit Court.

b. The rule announced by the Circuit Court is in conformity with the rule in the State and Federal Courts.

c. The Circuit Court correctly remanded the case.

d. Petitioner incorrectly charges that there was no unity of title.

e. The question of law involved requires no clarification by this Court.

f. The decision of the Circuit Court presents no difficult appraisal problems.

g. The Petition presents no question which involves a conflict of authority in the various Circuit Courts.

FIRST

The "Question Presented" was not in issue in the Circuit Court and was not decided by the Circuit Court.

The question which the Circuit Court decided was that if part of a unified, integrated property is taken by condemnation, damages for severance, if proven, should be allowed regardless of whether or not the part condemned was contiguous to the balance of the unified property, and that "evidence should have been considered in order to determine as a matter of fact whether, in spite of lack of physical contiguity, their holdings by reason of the uses to which they were being put, or would probably be put in the reasonably near future, constituted "a single integrated, unitary tract." (143 F. [2d] 391.)

The "Question Presented" cannot be adduced from the decision or the opinion of the Circuit Court.

The statement of the "Question Presented" is so confused that it is difficult to determine just what point the Petitioner wishes this Court to consider. Let us analyze the statement of the "Question Presented":

(a) "Damages to sugar mill properties."

The property which Respondents contend is a single unified whole, is one single rural property all but one piece of which was acquired at one time, by one deed, and recorded as one farm (*Baetjer* v. *Registrar*, 48 P.R.R. 647; also R. 43-46). A contiguous piece of 2,000 acres was acquired later and formed part of the single unit. The property remaining after the severance consists of several thousands of acres of land on which are located sugar mills devoted to processing sugar cane grown on the estate lands into a marketable agricultural product. The property is not "sugar mill properties", but a large unified agricultural estate consisting of cane land, necessary pastures and containing sugar mills as part of the essential farm improvements. The Circuit Court correctly held that this was a fact which we should have been permitted to prove.

(b) "Because of resulting economic capacity."

This is in reality the only question stated in the Petition,—namely, *whether economic over-capacity of sugar mills* resulting from the taking of non-contiguous lands must be compensated for in condemnation proceedings. The Circuit Court did not so hold. On the contrary, the Circuit Court carefully pointed out (142 F. [2d] 395, 396) that the only compensation which may be allowed "is the difference between the fair market value of the entire unitary tract before the taking and the fair market value of the part of the tract remaining thereafter". That this is a correct statement of the law is axiomatic.

(c) "Not physically contiguous to the mill properties."

The emphasis on mill properties is not warranted by the opinion of the Circuit Court or by any facts appearing in the record. The part remaining from which the property

condemned was severed as we have said above, consists of an estate of several thousand acres of agricultural land on which sugar mills are located as part of the farm improvements.

(d) "Not presently devoted to the same use."

This is a statement of fact which cannot possibly be derived from the record, and the Court did not so find. The record clearly shows that the land condemned was presently used as essential pasture of the entire unified estate, and that its use in part for cane production had been only temporarily suspended because of quota restrictions, which in fact had been lifted shortly before the condemnation proceedings were brought (R. 179, 180).

The Petitioner apparently is asking this Court to examine the record and determine the facts.

(e) "And the properties are not held entirely in a unified fee ownership."

This is a misstatement of undisputed facts. The entire single, unified property is owned in fee. Respondents have at no time claimed damages for severance from leased lands, which appears to be the basis of Petitioner's contention that "the properties are not held entirely in a unified fee ownership" (P. 2). That the Respondents in addition to the unified estate, also leased additional lands is immaterial.

In order to state a "Question", Petitioner has read into the opinion of the Circuit Court conditions which do not exist, and assumptions of fact which are not supported by the record, and which were in no way essential or relevant to the problem under consideration by the Circuit Court.

In order to consider the "Question Presented" this Court would first have to examine the entire record and in effect formulate findings of fact.

SECOND

The petition does not state any reasons sufficient to justify granting the writ.

(a) Petitioner has not correctly interpreted the opinion of the Circuit Court.

Petitioner (P. 8) represents the Circuit Court as holding that "there would be a compensable loss if after the taking the appellants' mills had an uneconomic over capacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking." By failing to complete the sentence, the Petitioner creates a false impression of the Court's decision. The opinion continues after a comma, "this being a matter which a hypothetical buyer would consider in determining what he would pay for the property". When the whole sentence is read the meaning of the Court is a clear and precise statement of the principle which has been firmly established by this Court. The Court had already said that "the landowner's compensation is the difference between the fair market value of the entire unitary tract before the taking and the fair market value of the part of the tract remaining thereafter."

Having misinterpreted the opinion of the Court, Petitioner then proceeds in paragraph numbered 1 (P. 8) to attack a principle which the Circuit Court did not announce. Neither *United States* v. *Miller,* 317 U. S. 369, nor *Mitchell* v. *United States,* 267 U. S. 341 (P. 9), have any bearing on the point decided by the Circuit Court. This Court, in the quotation from the opinion in the former case, was referring to separate properties not forming part of a unified whole. The quotation in fact follows the statement by this Court that "a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it." In the latter case, the claimant had accepted an award for his property without protest (343) and then proceeded in the Court of Claims

to demand indemnity for the loss of a business which had been conducted on the land. The claim was not for value of property at all.

The difference between the present case and the *Powelson* case (319 U. S. 266, reversing *United States* v. *Powelson,* 118 F. [2d] 79), (P. 10), is that in the *Powelson* case the unity was prospective and impossible of realization, whereas in the present case it is an actual present fact. This Court reversed the Circuit Court in the *Powelson* case, not because the Circuit Court (118 F. [2d] 79, 86) had allowed severance damages for non-contiguous tracts, but because there were impediments to the ultimate realization of the integration. If this Court had deemed contiguity to be a *sine qua non* of severance damages, it could have reversed the Circuit Court quite simply on that ground.

In *McCandless* v. *United States,* 298 U. S. 342 (P. 10), this Court held that the prospect of future irrigation from sources many miles distant owned by other parties, with intervening properties also owned by others, was a proper element in determining value.

(b) The rule announced by the Circuit Court is in conformity with the rule in the State and Federal Courts.

Petitioner states that "similar claims have been made and rejected in numerous State cases". The cases cited do not warrant that conclusion.

City of Oakland v. *Pacific Coast Lumber Company,* 171 Cal. 392 (P. 10), rested solely on a construction of the California statute which expressly requires contiguity as a matter of law as a prerequisite to severance damages. The other State cases cited by Petitioner rest squarely on the proposition that as a matter of fact the parcels in question were not so related to each other in use as to make them a single unitary property. In fact in several of these cases the principle is recognized that if properties are a single unit, even though not contiguous, severance damages are properly allowable, notably, *Kansas City M. & O. Ry. Co.*

v. *Littler*, 70 Kan. 556 (P. 11), *Potts* v. *Railroad Co.*, 119 Pa. 278 (P. 10), *Railroad* v. *Aubuchon*, 199 Mo. 352 (P. 11). *State* v. *Bradshaw Land and Livestock Co.*, 199 Mont. 95 (P. 11), rested squarely on the state statute defining severance damages and expressly held that there was no showing that separated lands were permanently injured or destroyed. The doctrine stated in *Fleming* v. *Chicago, D. & M. Railroad Co.*, 34 Iowa 353 (P. 11), was expressly repudiated in the subsequent case of *Paulson* v. *State Highway Commission*, 210 Iowa 651, which held that where two parcels were a mile apart "it was for the jury to determine whether or not the farm was a single and entire farm for the purpose of estimating the damages."

The rule of unity regardless of contiguity is the logical, sensible rule and is the rule of the Federal Courts and most State Courts. *Sharp* v. *United States*, 112 F. 893, 896, approved in *Sharp* v. *United States*, 191 U. S. 341; *United States* v. *Grizzard*, 219 U. S. 180; *Grand River Dam Authority* v. *Thompson*, 118 F. (2d) 242, 245. No decision of this Court or of any Federal Court is referred to in the Petition, which holds differently. For a review of State cases and a discussion of the principle, see *Essex Storage Electric Co.* v. *Victoria Lumber Co.*, 93 Vt. 437, 108 A. 426.

Early cases to the contrary have been repudiated. *United States* v. *Chicago, B. & Q. R. Co.*, 82 Fed. (2d) 131 (cert. den. 298 U. S. 689).

Petitioner cites 2 Nichols, Eminent Domain (2nd Ed.) 740 (P. 9). This is what Mr. Nichols says:

> "If the land is actually occupied or in use the unity of the use is the chief criterion. When two parcels are physically distinct there must be such a connection or relation of adaptation, convenience and actual and permanent use as to make the enjoyment of one reasonably necessary to the enjoyment of the other in the most advantageous manner in the business for which it issued, to constitute a single parcel within the meaning of the rule."

What we objected to in the Circuit Court was the refusal of the District Court as a matter of law to permit us to prove unity,—a unity which had been actually found to exist by the Supreme Court of Puerto Rico in an appeal raising the very same issue with respect to the very same lands. *Baetjer* v. *Registrar*, 48 P. R. R. 647, 648, 649.

The District Court struck out all evidence as to severance on the ground that there was no severance "in the legal sense". Obviously the Court failed to consider the evidence it had stricken. The District Court made no findings of fact.

The Circuit Court correctly held that "evidence should have been considered in order to determine as a matter of fact whether, in spite of lack of physical contiguity, their holdings by reason of the uses to which they were being put, or would probably be put in the reasonably near future, constituted a single integrated, unitary tract" (143 F. [2d] 391).

(c) The Circuit Court correctly remanded the case.

Petitioner contends (P. 12) that if the District Court had considered the evidence of integration and unity it would have held that unity and integration did not exist. We assume that this Court will not perform the function of deciding what the District Court would have found if it had considered the evidence. That is the function of the trial court.

(d) Petitioner incorrectly charges that there was no unity of title.

The Petitioner contends (P. 13, 14) that there is no unity of title because defendants also held land under lease in addition to the estate of which Respondents claim that the land condemned formed an integral part. Severance damage was not claimed on account of damages to a property part of which is leased. The compensation asked is for damages to the balance of the integrated estate owned in fee.

(e) The question of law involved requires no clarification by this Court.

The result of the decision of the Circuit Court does not extend the Federal Government's liability in cases where severance damage is claimed (P. 15). The Petitioner seeks to have this Court repudiate a rule long established in the Federal Courts and in most State Courts, that damages for severance depend on whether the value of a unified property has been affected by the condemnation of a part regardless of whether or not the part taken is contiguous to the balance of the unit.

(f) The decision of the Circuit Court presents no difficult appraisal problems.

Finally the petition states as a reason for granting the writ that "if the ruling below is sound, large integrated companies with disconnected holdings will in fact be obtaining, under the guise of severance damages, compensation for business losses which were denied by this Court in the *Mitchell* case". The opinion of the Circuit Court warrants no such conclusion. So long as the courts, as the Circuit Court did in this case, limit compensation to the value of real property taken, severance damages to cases where the property condemned forms part of a unified, integrated property, and follow the rule of the willing buyer and the willing seller as announced by the Circuit Court, there would seem to be little danger that the United States will be imposed upon by the Courts.

(g) The Petition presents no question which involves a conflict of authority in the various Circuit Courts.

The decision of the Circuit Court is logical, reasonable and follows the principles long established in the Federal Courts. No convincing reason is given for asking this Court to change the rule of severance damages.

CONCLUSION

The decision of the Circuit Court of Appeals was in all respects correct and the Petition should be denied.

Respectfully submitted,

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San Juan, Puerto Rico,
November 1, 1944.